FILE COPY

No. 663

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Middle District of Tennessee

Civil Action No. 54

UNITED STATES OF AMERICA, PLAINTIFF

v.

CRESCENT AMUSEMENT COMPANY ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on May 17, 1943. A petition for appeal was filed on October 27, 1943, and is presented to the District Court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36

Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Interstate Circuit v. *United States*, 306 U. S. 208.

United States v. *American Tobacco Co.*, 221 U. S. 106, 188.

United States v. *Reading*, 226 U. S. 324, 373.

United States v. *Delaware Hudson Co.*, 253 U. S. 26, 63-64.

STATUTES INVOLVED

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2):

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine

or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUE AND THE RULING BELOW

On August 11, 1939, the appellant filed its complaint charging the defendants with violating Sections 1 and 2 of the Sherman Act by monopolizing and unreasonably restraining competition in the exhibition of films in towns in Alabama, Kentucky, and Tennessee. The exhibitor defendants are a group of affiliated corporations engaged in operating motion-picture theatres and their principal officers, all of which were charged with combining their theatres in licensing films from the major distributors for the purpose of eliminating independent competitors. The complaint, as amended, also alleged that these defendants had used coercive and predatory practices in acquiring independent theatres and monopolizing the business of exhibiting films in numerous communities. The complaint prayed that the combination of exhibitor corporations in question be declared illegal, that the combination be dissolved, and that the defendants be enjoined from continuing their

illegal monopolies and from continuing to combine their theatres for the purpose of compelling licensing discriminations against their competitors. The prayer for relief also included the following request, which is the only one directly involved in this appeal:

> 7. That the defendant exhibitors, and each of them, be enjoined and restrained from acquiring any additional theaters or financial interests therein, except where they shall establish to the satisfaction of this Court that such acquisitions will not unreasonably restrain competition or create, or tend to create, a monopoly in the licensing of feature pictures for first-run or second-run exhibition or in the operation of first-run or second-run theaters in any of the towns in which they operate theaters.

Trial of the case was begun on July 7, 1941, and the taking of evidence was concluded on August 29, 1941. Briefs were then filed, together with proposed findings of fact and conclusions of law, and oral argument was had on December 1, 1941. On March 3, 1943, Judge Elmer Davies, sitting in the Middle District of Tennessee, rendered a decision which sustained most of the factual allegations of the complaint and concluded that the United States was entitled to a decree enjoining the defendants from continuing to violate the act in the manner alleged and proved and requiring them to dissolve the combination of corporations

described in the complaint, which he found to be unlawful, by a divestiture of stock interests. A copy of his findings of fact and conclusions of law is attached. No opinion was rendered.

The court found, under the heading "Elimination of Competition," at pages 8 to 46 of his decision, that the defendant exhibitors had, during the period from 1936 to 1940, acquired at least ten theatres in ten different towns for the purpose of eliminating independent theatre competition and had threatened at least seven more independent operators with a similar elimination by film-licensing discriminations and threats of unfair competition. The court concluded that they had violated the Sherman Act by:

> A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

In conclusion of law No. 20, the court also held, in accordance with a request for such holding in the Government's brief, that there should be a provision in the decree:

> * * * restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville,[1] except after an affirmative showing that such acquisition will not unreasonably restrain competition.

[1] Nashville was excluded from the suit by the complaint.

Accordingly, the Government on May 6, 1943, presented for entry a decree including a provision in these terms. The court, however, despite this conclusion of law, indicated at the hearing that it did not desire to include this provision because it did not wish to be faced with the problem of having to make further decisions each time an exhibitor defendant might wish to acquire a theatre.

On May 17, 1943, the court entered a final decree, a copy of which is attached, in which it gave the following relief with respect to theatre acquisitions:

> (19) That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents, or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

Paragraph (9) of the decree enjoins each exhibitor from—

> * * * coercing, or attempting to coerce, independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

On August 30, 1943, the Court modified its findings of fact and conclusions of law in certain respects not material here, in response to motions made by the defendants within the time allowed by law, but made no change in its decree. By the same order the Court, on its own motion, modified the language quoted above from its original conclusion of law number 20, in accordance with the decree entered on May 17, to read as follows:

> * * * restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents, or servants are guilty of coercing, or attempting to coerce, any such independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

THE QUESTION IS SUBSTANTIAL

The appellant believes that the District Court erred in declining to enter a provision in conformity with its decision of March 3 and in substituting paragraph (19) of the decree quoted above. Upon the record of repeated illegal theatre acquisitions made in this case, it was clearly

not sufficient merely to enjoin the defendants from acquiring theatres where they repeated the illegal practices used in the past. But even if the court had made this provision against acquisitions coextensive with the prohibitions of the Sherman Act itself, the provision would have been inadequate to protect the public from the destruction of competition in the remaining independent areas. Once the elimination of such competition occurs, the filing of a contempt proceeding can never restore the preexisting competitive situation. Hence, the only adequate relief against persons adjudged to have repeatedly violated the Act by illegally acquiring, and illegally threatening to acquire, independent theatres is a provision which will prevent the elimination of such competition before the elimination occurs.

The question of securing adequate relief against theatre acquisitions by large circuits which eliminate independent competition is one which is vital to the enforcement of the antitrust laws in the motion-picture field. This question is directly involved in three other pending suits, (1) *United States* v. *Schine Chain Theatres et al.*, filed August 7, 1939, in the District Court for the Western District of New York, in which a two-year temporary order was entered on May 19, 1942, and which will come on for trial on May 19, 1944; (2) *United States* v. *Griffith Amusement Company et al.*, filed April 28, 1939, in the District Court for the Western District of Oklahoma,

which is awaiting trial pending the disposition of preliminary motions; and (3) *United States v. Paramount Pictures Inc., et al.*, filed in the District Court for the Southern District of New York, on July 20, 1938, in which a consent decree was entered on November 20, 1940, which comes up for modification or trial of the issues on November 20th of this year. The first two suits named above are against large theatre circuits and involve substantially the same practices and pray for substantially the same relief as that asked in this case. The third case is against the major film distributors and their theatre-operating subsidiaries. It alleges the use of similar practices to those involved in the *Crescent* suit for the purpose of eliminating independent competition and, in addition to dissolution of the offending theatre circuits, prays for divorcement of the distribution from the exhibition end of the business.

Experience under the temporary order in the *Schine* case and the consent decree entered in the *Paramount* case has demonstrated that the problem of the widespread elimination of independent theatre competition by the large circuits cannot be solved by action taken after the acquisitions occur. It is, as a practical matter, impossible to restore by decree or court order a competitive theatre situation after the competition in question has been eliminated by acquisition of the competing theatre or theatres. Unless the Gov-

ernment is given the remedy which the court in this case concluded that it was entitled to but rejected on administrative considerations, the Government believes that it will be unable to secure the continued existence of independent theatre competition which the Sherman Act contemplates. This issue is one of substance and calls for decision by this Court.

Respectfully submitted.

CHARLES FAHY;
Charles Fahy,
Solicitor General.

Nov. 25, 1943.